

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD E. DENK)	
Claimant)	
VS.)	
)	
STATE OF KANSAS)	Docket No. 176,667
Respondent)	
Self-Insured)	

ORDER

Respondent requested the Appeals Board to review the Award entered by Administrative Law Judge Robert H. Foerschler dated August 29, 1995. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Gregory D. Worth of Lenexa, Kansas. The respondent, a self- insured, appeared by its attorney, J. Paul Maurin III of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The following issues were raised by the respondent for Appeals Board review:

- (1) Nature and extent of claimant's disability.

- (2) Whether the Administrative Law Judge erred when he ordered the respondent to reimburse the claimant for medical expenses incurred for chiropractic treatment by Drs. Lawrence J. Eker and Thomas B. Wright.

At oral argument before the Appeals Board the claimant raised the following issues for review:

- (3) Whether additional temporary total disability weekly benefits are due claimant for work he missed as a result of his work-related low back injury.
- (4) Whether claimant is eligible for an award of future medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing arguments of the parties, the Appeals Board finds as follows:

- (1) Claimant injured his low back on May 4, 1992, when he twisted and turned toward a coworker who had come up from behind and greeted him. At that time, claimant was standing outside his car bent over, leaning into his car, and getting some papers from an open briefcase. Claimant immediately felt a pain sensation in his lower back. The accident occurred at a courthouse annex located in Wyandotte County, Kansas where claimant was employed by the Kansas Highway Patrol Vehicle Inspection Department as a vehicle identification number inspector. Claimant's job required him to inspect out-of-state motor vehicles applying for Kansas registration and to verify information on the title of the vehicle with the vehicle's identification number, odometer, and engine size. The claimant was required to work four hours personally inspecting the vehicles and the other four hours per day completing clerical work at a desk. The inspection portion of the job required the claimant to bend and twist at the waist in order to verify the vehicle identification number.

Claimant testified he notified his immediate supervisor, Tad Houston, of his accident on the day it occurred. Claimant indicated that because he was not familiar with workers compensation procedures he first went on his own for medical treatment to his family doctor, Robert Powers, M.D., and to a chiropractor Dr. Lawrence Eker. However, due to his back remaining symptomatic, claimant was sent by respondent for medical treatment to the Kansas University Medical Center (Medical Center) on June 11, 1992. Claimant received conservative medical treatment from the Medical Center consisting of medication and physical therapy. He also was restricted to working only four hours per day doing clerical work at the desk. Claimant was released from treatment on August 26, 1992, for full work duty and to continue physical therapy exercises at home.

Claimant had to return to the Medical Center on September 16, 1992, because of continued back pain. Claimant testified he was in constant pain while performing the inspection part of his job that required him to twist and bend. In an effort to find an anatomic location of claimant's complaints, the Medical Center performed an EMG on October 5, 1992, and an MRI on October 12, 1992. Both of those procedures proved unremarkable. Claimant was released to return to full duty by the Medical Center on October 22, 1992, without permanent job restrictions.

Claimant testified that in order to keep working after his work-related accident he had to supplement the treatment provided by the respondent at the Medical Center with private chiropractic treatment which included acupuncture. Claimant also started missing time from work which he attributed to his low back problems. Because these problems continued, claimant returned to the Medical Center for additional medical treatment on April 20, 1993.

Claimant was seen at the Medical Center by Anthony M. Hicks, M.D., a specialist in occupational medicine. Dr. Hicks found claimant had right lower back pain without objective medical findings. The doctor placed claimant on pain medication, home exercises, ice or heat, and returned claimant to full work duty. Dr. Hicks followed claimant until May 25, 1993, when he returned claimant to regular work with activities as tolerated. During the time that claimant was under Dr. Hicks' care, he underwent a functional capacity evaluation and an occupational therapy job sight evaluation. Results of both of those evaluations concluded that claimant was physically capable of performing the duties of the vehicle inspection job.

However, according to claimant's supervisor Tad Houston, following the injury claimant started missing work, was unable to maintain a proper relationship with his coworkers and customers, and failed to follow directives. Claimant's poor performance necessitated Mr. Houston to give the claimant an unsatisfactory job evaluation on his employment anniversary date in March of 1993. The unsatisfactory evaluation was followed up in May 1993 with another unsatisfactory evaluation which recommended termination. Immediately after the unsatisfactory job evaluation was communicated to claimant on May 17, 1993, he told Mr. Houston he was submitting his voluntary resignation. In contrast, claimant attributes all of his poor job performance to his low back injury. Additionally, claimant testified he was harassed by his supervisor to the point that he was forced to quit his job.

A short time following the resignation, claimant was able to secure a job with the Wyandotte County Sheriff's Department as a classified technician. This was a sedentary desk job which required interviewing jail inmates. Claimant was only employed for a few weeks before he obtained a leave of absence from the job to perform work on the wheat harvest in western Kansas. While claimant was helping on the wheat harvest, he had another flare-up with his back and was not able to return to work after the leave of absence. The Sheriff's department finally terminated claimant for absenteeism. Claimant

testified he could not perform the classification technician job because the job required him to sit for a long periods of time which caused him low back pain. Claimant also gave inconsistent testimony that some of reasons he did not return to the technician job was because he did not like to work with the inmates, he had to work underground, he had to work the undesirable night shift, and he had to work weekends.

Claimant was examined and evaluated by two orthopedic surgeons who both testified in this matter. Nathan Shechter, M.D., examined the claimant on July 20, 1993, at the request of claimant's attorney. Dr. Shechter took a history from the claimant, reviewed records of claimant's prior medical treatment and performed a physical examination. The doctor diagnosed a musculoligamentous involvement of claimant's lumbar spine with a possible herniated lumbar disc resulting from the May 4, 1992, accident. Dr. Shechter assessed claimant with a permanent functional impairment of 10 percent. The doctor restricted claimant to avoid excessive bending, twisting, and limited claimant's lifting to a single lift of 50 pounds and no repetitive lifting. The bending, twisting, and lifting activities would be limited not to exceed 10 times per hour.

Orthopedic surgeon Fred A. Rice, Jr., M.D., was appointed by the Administrative Law Judge to perform an independent examination of the claimant. Dr. Rice saw claimant once on January 26, 1994. He diagnosed musculoskeletal soft tissue injury to the lumbar paravertebral muscles and the right flank superimposed on the lumbar spine with moderate degenerative changes. The doctor opined the May 4, 1992, accident aggravated claimant's underlying degenerative condition of the spine. Based on the AMA Guides, Dr. Rice opined claimant's permanent functional impairment was 5 percent. He restricted claimant to refrain from employment activities requiring significant lifting, bending, or twisting of the back. After Dr. Rice observed a video tape of claimant performing his job duties, as vehicle inspector, he opined the job duties violated the permanent restrictions he had placed on claimant.

The respondent had the claimant return to Dr. Hicks, at the Medical Center on November 23, 1993, for the purpose of assessing permanent functional impairment and permanent restrictions. After reviewing claimant's history, his treatment regimen at the Medical Center, the results of the functional capacity evaluation, the results of the occupational job sight evaluation, and the physical examination, Dr. Hicks concluded that the claimant had no whole body personal impairment and had no permanent physical activity restrictions. The doctor further opined, if claimant did injure his low back on May 4, 1992, such injury was a minor musculoligamentous injury completely resolved at the time of the evaluation. Furthermore, Dr. Hicks found no objective medical confirmation of any kind correlating with the claimant's subjective complaints.

The respondent argues the Administrative Law Judge erred when he found claimant was entitled to permanent partial disability benefits based on work disability. The respondent contends that the presumption against work disability contained in K.S.A. 1991 Supp. 44-510e(a) applies because the claimant was able to return to work at a comparable

wage for over a year following his injury and he voluntarily terminated his employment with the respondent for reasons not associated with his injury.

Following claimant's work-related injury of May 4, 1992, the facts and circumstances contained in the evidentiary record of this case make it difficult for a determination to be made on the issue of whether claimant is entitled to a work disability award. However, after reviewing the record as a whole, the Appeals Board finds claimant's subjective complaints coupled with Dr. Rice's opinion that the vehicle inspector job exceeds claimant's permanent restrictions, proves claimant is entitled to a work disability. The Appeals Board further concludes that a work disability should be determined based on the permanent restrictions imposed by Dr. Rice, the appointed independent medical examiner. The Appeals Board finds Dr. Rice's opinion should be given the most weight as his opinion on balance is between the diverse opinions of treating physician, Dr. Hicks and claimant's evaluating physician, Dr. Shechter.

The only evidence in the record in regard to work disability was presented by the claimant through the testimony of vocational expert, Michael Dreiling. Mr. Dreiling personally interviewed the claimant on March 24, 1994, and reviewed medical records of claimant's treating and evaluating physicians. Utilizing Dr. Rice's permanent postinjury restrictions that claimant should refrain from significant lifting, bending, or twisting, Mr. Dreiling expressed his opinion on the first component of the work disability test contained in K.S.A. 1991 Supp. 44-510e(a), that claimant had lost 25 percent of his ability to perform work in the open labor market. In regard, to the wage loss component of the work disability test, Mr. Dreiling found claimant had a 13 percent wage loss if he was able to obtain a bus driver's job in the future when he returned to Beloit, Kansas. Mr. Dreiling went on to opine that claimant's wage loss was 26 percent taking into consideration the Kansas City labor market.

As previously noted above, the Appeals Board finds Dr. Rice's permanent restrictions are the most credible and persuasive evidence to use in determining claimant's loss of ability to perform work in the open labor market and to earn comparable wages. Accordingly, Mr. Dreiling's opinion of 25 percent is adopted as the appropriate finding for the labor market loss component of the work disability test. The Appeals Board also adopts Mr. Dreiling's 13 percent wage loss opinion but does so by comparing different preinjury and postinjury average weekly wages. The Administrative Law Judge found the appropriate preinjury average weekly wage amounted to \$407 per week and the Appeals Board adopts that finding. The Appeals Board concludes claimant postinjury had the physical ability to perform the classification technician job at the Wyandotte County Sheriff's Department which paid \$1,540 per month or \$355.38 per week. Therefore, the Appeals Board finds this is the appropriate average weekly wage to use in determining claimant's wage earning ability postinjury. Comparing those average weekly wages, the claimant's wage loss is 13 percent. The Appeals Board concludes claimant's loss of ability to perform work in the open labor market of 25 percent should be weighed equally with his wage loss of 13 percent entitling the claimant to a 19 percent work disability. See Hughes

v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The Appeals Board also finds the claimant worked from the date of accident, May 4, 1992, through his last day worked, May 17, 1993, at his regular job earning a comparable wage. Therefore, the Appeals Board concludes for that period of time claimant is limited to permanent partial disability benefits based on functional impairment. See K.S.A. 1991 Supp. 44-510e(a). Dr. Rice opined claimant had a 5 percent permanent functional impairment rating and the Appeals Board adopts such rating. Thereafter, claimant is eligible for permanent partial disability benefits based on work disability of 19 percent.

(2) The Administrative Law Judge in the Award ordered the respondent to reimburse the claimant for chiropractic treatment he received from Dr. Lawrence J. Eker on September 14, 1992, October 5, 7, and 13, 1992, in the amount of \$80 and from Dr. Thomas B. Wright, from August 26, 1993 through April 4, 1994, in the amount of \$651. Respondent argues it never authorized claimant to be treated by a chiropractor and appropriate medical treatment was provided by respondent for claimant's low back injury at the Medical Center commencing on June 11, 1992, and thereafter.

The Appeals Board agrees with the respondent's argument. At a prior preliminary hearing the claimant submitted a medical bill from Dr. Eker that indicated he had treated claimant after claimant's work-related injury of May 4, 1992, from May 7, 1992, through June 9, 1992, for a total amount of \$180. The respondent paid that portion of the bill. However, the remaining additional balance of \$80 is for chiropractic treatment that occurred after June 11, 1992, when the respondent referred the claimant for treatment to the Medical Center. Dr. Wright's bill was also for chiropractic treatment that occurred after June 11, 1992. The Appeals Board finds the respondent provided medical care for claimant's injury after June 11, 1992, and therefore claimant's request for reimbursement of \$80 to Dr. Eker and \$651 to Dr. Wright incurred after June 11, 1992, is denied except as unauthorized medical within the statutory allowed amount.

(3) Claimant requested payment of weekly temporary total disability benefits for the time he missed work after his May 4, 1992, work-related accident because he was required to take accumulated sick leave and vacation leave instead of being paid temporary total workers compensation benefits. The Administrative Law Judge refused this request and the Appeals Board agrees. The Administrative Law Judge awarded claimant 15.86 weeks of weekly temporary total disability benefits. Neither party objected to this award. Accordingly, the Appeals Board finds claimant received weekly temporary total disability compensation for time he was off subsequent to his work-related injury. The Appeals Board also finds there is insufficient evidence in the record to prove that the claimant was temporarily and totally disabled in excess of the 15.86 weeks awarded.

(4) The claimant questions the Administrative Law Judge's finding that there does not appear to be any necessity for future medical treatment. Claimant points to Dr. Shechter's testimony that indicated claimant's injury will need physical therapy from time to time, medication, and may require a surgical procedure as ample evidence on the issue of future

medical treatment. The Appeals Board agrees with the claimant and orders future medical treatment upon proper application to and approval by the Director.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge contained in the award that are not inconsistent with the specific findings made above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated August 29, 1995, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronald E. Denk and against the respondent, State of Kansas, a self-insured, for an accidental injury which occurred May 4, 1992, and based upon an average weekly wage of \$407.

Claimant is entitled to 15.86 weeks of temporary total disability compensation at the rate of \$271.35 per week or \$4,303.61, followed by 38.14 weeks at the rate of \$13.57 per week or \$517.56, for a 5% permanent partial functional disability, followed by 361 weeks at the rate of \$51.56 per week, or \$18, 613.16, for a 19 percent permanent partial general work disability making a total award of \$23,434.33.

As of February 20, 1997, there is due and owing claimant 15.86 weeks of temporary total disability compensation at the rate of \$271.35 per week or \$4,303.61, followed by 38.14 weeks of permanent partial compensation at the rate of \$13.57 per week or \$517.56, followed by 196.43 weeks of permanent partial compensation at the rate of \$51.56 per week or \$10,127.93, for a total of \$14,949.10 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,485.23 is to be paid for 164.57 weeks at the rate of \$51.56 per week, until fully paid or further order of the Director.

Future medical treatment is ordered upon proper application or approval of the Director.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory D. Worth, Lenexa, KS
J. Paul Maurin III, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director